95

Supreme Court, U.S.
FILED

071543 MAY - 8 2008

OFFICE OF THE CLERK

Docket No: (1)

United States Supreme Court

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Yvonne E. Thurner v. Commissioner of Internal Revenue

Yvonne E. Thurner, *pro se*
Petitioner
1441 N. Mayfair Road
Wauwatosa, Wisconsin 53226
(414) 257-3900

Questions Presented for Review

1. Whether the Seventh Circuit Court of Appeals erred when it ruled that it did not have jurisdiction to hear the appeal of the Tax Court's denial of Petitioner's first and second Motions to Vacate.

2. Whether the Seventh Circuit Court of Appeals erred when it found that the Tax Court did not abuse its discretion when it failed to file the Petitioner's third Motion to Vacate Decision.

3. Whether the Seventh Circuit Court of Appeals erred when it ruled the Tax Court did not abuse its discretion when it failed to vacate its December 23, 2006 Order dismissing the case as requested in Petitioner's third Motion to Vacate Decision.

4. Whether the Seventh Circuit Court of Appeals erred in finding that the Tax Court had failed to provide Petitioner a degree of accommodation and a "fair and

meaningful" consideration of her claims before the tax court as a *pro se* litigant.

List of Parties to the Proceeding

Yvonne E. Thurner, Petitioner and Petitioner in Seventh Circuit Court of Appeals proceeding;

Commissioner Of Internal Revenue, Appellee in the Seventh Circuit Court of Appeals proceeding.

Table Of Contents

The Seventh Circuit Court of Appeals erred when it ruled that it did not have jurisdiction to hear the appeal of the Tax Court's denial of Petitioner's first and second Motions to Vacate.....13

The Seventh Circuit Court of Appeals erred when it found that the Tax Court did not abuse its discretion when it failed to file the Petitioner's third Motion to Vacate Decision.....19

The Seventh Circuit Court of Appeals erred when it ruled the Tax Court did not abuse its discretion when it failed to vacate its December 23, 2006 Order dismissing the case as requested in Petitioner's third Motion to Vacate Decision.....22

The Seventh Circuit Court Of Appeals Erred In Finding That The Tax Court Had Failed To Provide Petitioner A Degree Of Accommodation And A "Fair And Meaningful" Consideration Of Her Claims Before The Tax Court As A *Pro Se* Litigant.....24

Appendices

1. Tax Court Order Granting Stipulated Decision.....34

2. Tax Court Order Granting Motion By Petitioner's Counsel Christopher J. Ertl To Withdraw as Counsel..36

3. Tax Court Order Granting Motion By Petitioner's Counsel Christopher J. Ertl To Vacate.....39

4. Tax Court Order Denying Motion To Vacate Decision..42

5. Tax Court Order Denying The Filing Of Petitioner's Third Motion To Vacate Decision.....46

6. Seventh Circuit Court Of Appeals Order Regarding Timeliness Of Appeal.....48

7. Seventh Circuit Affirmation Of Tax Court Decision.....51

8. Seventh Circuit Denial Of Petition For Rehearing And Petition For Rehearing Enbanc.....57

Table Of Cited Authorities

Adams v. Connors, 2002 U.S. Dist. LEXIS 14664 *15 (N.D. Ill., Eastern Div. 2002) 27, 29

Anilina Fabrique de Colorants, v. Aakash Chemicals and Dyestuffs, Inc., 856 F.2d 873, 876-7 (7th Cir. 1988). 14

Associates Discount Corp. v. Goldman, 524 F.2d 1051 (3d Cir. 1975) 23, 31

Boyko v. Ron Anderson, Superintendent, 185 F.3d 672, 673 (7th Cir. 1999) 15

Bradford Exchange v. Trein's Exchange, 600 F.2d 99, 102 (7th Cir. 1979). 23

Browder v. Dir., Dep't of Corr. of Illinois, 434 U.S. 257, 263 n.7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978) 19

Caruth v. Pinkney, 683 F.2d 1044, 1050 (7th Cir. 1982) 27, 28, 32

Del Carmen v. Emerson Electric Company, Commercial Cam Division, 908 F.2d 158, 161 (7th Cir. 1990)..... 14

Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007, 1011 (7th Cir. 2005). 19, 24

LaBow v. Commissioner of Internal Revenue, 763 F.2d 125, 129 (7th Cir. 1985)..... 20

Madyun v. Thompson, 657 F.2d 868, 876 (7th Cir. 1981) 27, 32

Shakman v. City of Chicago, 426 F.3d 925, 933 (7th Cir. 2005)..... 19

Smith v. Widman Trucking & Excavating, Inc., 627 F.2d 792, 796 (7th Cir. 1980) 23, 31

Textor v. Board Of Regents Of Northern Illinois University, 711 F.2d 1387, 1390-91 (7th Cir. 1983) 16, 18

Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 136 (10th Cir. 1966) 23, 31

Thompson v. Immigration and Naturalization Service, 375 U.S. 384, 11 L. Ed. 2d 404, 84 S. Ct. 397 (1964) 16, 17, 18

Thurner v. Comm'r of Internal Revenue, 2007 U.S. App. LEXIS 27176; 100 A.F.T.R.2d (RIA) 6774 51

Wilson v. Commissioner, 500 F.2d 645, 648 (2d Cir. 1974).. 20

Wort v. Vierling, 778 F.2d 1233, 1234-36 (7th Cir. 1985) 17, 19

Citations Of Opinions And Orders

Tax Court Order Granting Stipulated Decision (Appendix 1).....5

Tax Court Order Granting Of Motion By Petitioner's Counsel Christopher J. Ertl To Withdraw as Counsel (Appendix 2).....6,7

Tax Court Order Granting Motion By Petitioner's Counsel Christopher J. Ertl To Vacate (Appendix 3) 6, 31

Tax Court Order Denying Motion To Vacate Decision (Appendix 4).....6, 7

Tax Court Order Denying The Filing Of Petitioner's Third Motion To Vacate Decision (Appendix 5).....10, 15

Seventh Circuit Court Of Appeals Order Regarding Timeliness Of Appeal (Appendix 6).....11

Seventh Circuit Affirmation Of Tax Court Decision (Appendix 7).....11

Seventh Circuit Denial Of Petition For Rehearing And Petition For Rehearing Enbanc (Appendix 8).....12

Statement Of Basis For Jurisdiction

Petitioner's petition for a writ of certiorari is timely filed and the Court has jurisdiction because the Petitioner's petition is filed within ninety days after entry of a judgment pursuant to Rule 13 of the Rules of the Supreme Court. The order of the Seventh Circuit Court of Appeals denying Petitioner's appeal was issued on November 20, 2007, and the order denying Petitioner's Petition for Rehearing and Petition for Rehearing Enbanc was issued February 11, 2008.

Statutes And Regulations

Rule 10, Rules of the Supreme Court.....13

Statement Of The Case

1. Petitioner is a high-school educated, stay-at-home mother of four.

2. In 1990, the United States of America obtained a judgment against Petitioner and her husband for delinquent taxes, penalties and interest.

3. On December 21, 2000, Petitioner filed Form 8857 Request for Innocent Spouse Relief with the Internal Revenue Service ("IRS").

4. The IRS rejected Petitioner's application for Innocent Spouse Relief on March 21, 2001.

5. Petitioner filed a Petition for Determination of Relief from Joint and Several Liability on a Joint Tax Return in Tax Court on August 10, 2001, under Docket No. 9971-01.

6. Tax Court denied the IRS's motion to dismiss Petitioner's petition for relief on July 11, 2003.

7. In 2004, Petitioner retained the The Law Office of Robert G. Bernhoft, S.C., including attorney Christopher J. Ertl (the "law firm"), to represent her in Tax Court regarding this matter. In connection with this representation, Petitioner provided a Power of Attorney ("Power of Attorney") to the law firm in which she gave the law firm to negotiate, but specifically excluded the authority to sign any settlement or dispositive documents, on her behalf.

8. On December 15, 2005, Christopher Ertl, signed an unauthorized joint stipulation dismissing Petitioner's case, which the Tax Court Judge signed on December 23, 2005. *See* Appendix 1. At no time prior to signing this joint stipulation did Mr. Ertl discuss a dismissal of her case with Petitioner.

9. When Mr. Ertl finally informed Petitioner that he had agreed to a dismissal of the case, and after admitting that he did so without consulting her, Mr.

Ertl filed a Motion To Vacate the order dismissing the case on December 29, 2005, asserting that he "had good reason to believe that he had authority" but admitting that Petitioner "had not authorized it". *See* Appendix 3, ¶3, 4. At the same time, Mr. Ertl filed a Motion to Withdraw as Counsel, again without consulting Petitioner. *See* Appendix 2.

10. After being informed by Mr. Ertl that he was seeking to withdraw as counsel for her, Petitioner also filed a pro se Motion to Vacate on January 4, 2006, explaining that Mr. Ertl did not have the authority to sign the stipulation or to agree to the dismissal of the case and that she had specifically excluded such authority under the Power Of Attorney. *See* Appendix 4.

11. Despite Mr. Ertl's admission that he did not have the authority to stipulate to the dismissal of the case, and despite the fact that the IRS never filed any

objection to vacating the dismissal, the Tax Court denied his Motion to Vacate on January 10, 2006; however, the Tax Court did grant Mr. Ertl's motion to withdraw from representation of Petitioner. *See* Appendix 2, 3.

12. According to Mr. Ertl's representation to Petitioner, the Tax Court indicated to him on the telephonic conference on January 10, 2006 that the Court had not yet seen the pro se motion to vacate filed by Petitioner, but that the Court would be willing to consider such a motion filed by Petitioner. No transcript of the telephonic hearing was prepared.

13. Without a hearing or giving Petitioner a chance to be heard, and even though the IRS never filed any objection to the Petitioners Motion to Vacate, the Tax Court summarily denied Petitioner's pro se Motion to Vacate on January 17, 2006. *See* Appendix 4.

14. Based on the Judge's assertion to Mr. Ertl that he was willing to consider a Motion to Vacate from her, and in order to allow the Tax Court Judge an opportunity to fully consider Mr. Ertl's wrongdoing in this case that would merit vacating the dismissal before taking this case to the Seventh Circuit Court of Appeals, Petitioner filed a third Motion to Vacate ("Third Motion") on March 19, 2006, shortly after she received her records from the law firm, from which she first discovered that Mr. Ertl had provided a copy of the Power of Attorney to the IRS prior to signing the stipulation.

15. After filing the Third Motion, counsel for the Internal Revenue Service did not raise any objections as to the timeliness of the filing of the March 19, 2006 Motion to Vacate or otherwise object to the Third Motion.

16. On April 11, 2006 the Tax Court held a hearing by conference call on the Third Motion, during which only the merits of the Third Motion was discussed. At no time during the conference call was the timeliness of the Third Motion discussed, although the contents of the Power of Attorney were discussed in detail, as well as possible trial dates. In the call, counsel for the IRS argued that counsel for a taxpayer had an implied authority to dismiss the case, which Petitioner argued was not controlling since her Power of Attorney specifically excluded that authority, a fact of which the IRS had been made aware. At the conclusion of the conference call, the Court indicated that it was taking the Third Motion under consideration and would be issuing a ruling. No transcript of this telephonic hearing was prepared.

17. By order dated April 13, 2006 (which was not delivered into the mail by the Tax Court until Friday, April 14, 2006, and which was not received by Petitioner until April 18, 2006 – one day after the original time to file a Notice of Appeal would have expired), the Tax Court stated "upon due consideration of petitioner's untimely submitted third Motion to Vacate Decision ... the above-referenced untimely submitted third motion to vacate decision will not be filed." *See* Appendix 5.

18. Although the docket for this case reflects that the judge's decision was entered on April 13, 2006, a check of the Tax Court docket from the Tax Court's website on April 17, 2006 did not reflect the Court's ruling on the Third Motion.

19. The Tax Court did not otherwise contact Petitioner to let her know that he had issued a ruling on her Motion other than sending it by regular mail so that

it would not be received until after the original time for filing the Notice of Appeal would have run.

20. On May 2, 2006, Petitioner filed her appeal with the Seventh Circuit Court of Appeals.

21. By Order dated July 27, 2006, the Seventh Circuit Court of Appeals denied jurisdiction to hear Petitioner's appeal of the Tax Court's denial of the first two Motions to Vacate on grounds that the Petitioner's appeal was filed beyond the statutory time period, but admitted jurisdiction to hear Petitioner's appeal of the Tax Court's failure to file the Third Motion and the Tax Court's failure to grant such Third Motion. *See* Appendix 6.

22. On November 20, 2007, the Seventh Circuit affirmed the Tax Court's orders. *See* Appendix 7.

23. On December 4, 2007, Petitioner filed a Petition for Rehearing and Petition for Rehearing Enbanc with the Seventh Circuit Court of Appeals.

24. On February 11, 2008, the Seventh Circuit Court of Appeals denied Petitioner's Petition for Rehearing and Petition for Rehearing Enbanc. *See* Appendix 8.

Argument

Petitioner files the Petition for Writ of certiorari on grounds that the Seventh Circuit Court of Appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter, which conflicts with a decision by a state court of last resort; and sanctioned such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. *See Rule 10, Rules of the Supreme Court.*

1. The Seventh Circuit Court of Appeals erred when it ruled that it did not have jurisdiction to hear the appeal of the Tax Court's denial of Petitioner's first and second Motions to Vacate.

Petitioner asserts that the Seventh Circuit Court of Appeals erred when it ruled it did not have jurisdiction to hear the appeal of the Tax Court's denial of Petitioner's first and second Motions to Vacate because the Tax Court caused the Petitioner to delay in filing the Notice of Appeal

until after the expiration of the 90 days following the Tax Court's ruling on the Motion to Vacate filed with the Tax Court on January 4, 2006. By conducting a telephonic hearing on the merits of the Third Motion on April 11, 2007, which hearing was not transcribed, and by stating that it would take the matter under consideration and would issue a ruling, the Tax Court led the Petitioner to believe that it had considered the Third Motion as timely, and was ruling on the merits.

A lower "court's denial of a Rule 60(b) motion to vacate a default judgment is subject to review only for abuse of discretion." *Anilina Fabrique de Colorants, v. Aakash Chemicals and Dyestuffs, Inc.*, 856 F.2d 873, 876-7 (7th Cir. 1988) *(quotations and citations omitted).* "Abuse of discretion in denying a 60(b) motion is established only when no reasonable person could agree with the [lower] court; there is no abuse of discretion if a reasonable person could disagree as to the propriety of the court's action." *Del*

Carmen v. Emerson Electric Company, Commercial Cam Division, 908 F.2d 158, 161 (7th Cir. 1990) *(citations and quotations omitted).* The Seventh Circuit has also noted that relief from judgment under Rule 60(b) is warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust. *Id. (citations and quotations omitted).*

In this case, the Tax Court abused its discretion by hearing argument on the merits of the Third Motion, without addressing or allowing Petitioner to address the issue of timeliness, then leading Petitioner to believe that an order on the merits would be forthcoming – only to refuse to file the Third Motion because it was untimely. *See Boyko v. Ron Anderson, Superintendent,* 185 F.3d 672, 673 (7th Cir. 1999) (form of Court's order that "may have fooled" plaintiff was "irregular procedure"). *See,* Appendix 5.

By its action of hearing the Third Motion on its merits and not discussing the timeliness of the motion, the

Tax Court gave Petitioner implicit assurances that her Third Motion was either timely or that the Tax Court had granted an extension of her time to file the Third Motion. Because the Tax Court gave the Petitioner these implicit assurances during the time that an appeal would have been timely, causing the Petitioner to delay in filing her appeal, this case fits within the "unique circumstances" exception set forth by *Thompson v. Immigration and Naturalization Service,* 375 U.S. 384, 11 L. Ed. 2d 404, 84 S. Ct. 397 (1964) (*per curiam*), in which the Supreme Court said that under unique circumstances, a failure to timely file a Notice of Appeal will not bar jurisdiction in the Appellate Court. In *Thompson,* the appellant relied on the Court's explicit statement that a motion had been filed in "ample time" which caused the appellant to delay in filing his appeal. *See, also, Textor v. Board Of Regents Of Northern Illinois University,* 711 F.2d 1387, 1390-91 (7th Cir. 1983) (appellant relied on implicit actions of court, where judge

denied untimely motion to reconsider on basis other than untimeliness). These cases, as well as other cases that fit within the "unique circumstances" exception established by *Thompson* were discussed in *Wort v. Vierling*, 778 F.2d 1233, 1234-36 (7th Cir. 1985) ("... we have permitted parties to maintain otherwise untimely appeals where the appellant has reasonably and in good faith relied upon implicit or explicit judicial action seemingly extending the appeal period ... [in cases where] the trial court's action occurred prior to the expiration of the official period for filing a timely appeal.")

The Tax Court conducted a telephonic hearing just days before the official period for filing a timely appeal was set to run. In that hearing, the Court discussed the law surrounding implied authority of an attorney to enter into a joint stipulation, the specific limitations to that authority under the Power of Attorney, possible trial dates, and any other pre-trial motions that might be filed by the parties

should he vacate his order dismissing this case. He did not address the timeliness of the Third Motion. He did not advise the parties that he was considering the timeliness of the Third Motion, and did not ask the Petitioner any questions about why he should grant an extension of time for filing her Third Motion. Indeed, at the conclusion of the telephonic hearing, the court indicated that he was considering the merits of the Third Motion and that he would be ruling on that Motion. The Court then filed a decision declining to file the Third Motion and served that decision on the Petitioner in a manner that she would have insufficient time to file the appeal within the official filing period. Thus, Petitioner relied in good faith on the implicit judicial assurances by not filing a Notice of Appeal before the expiration of the official period of time.

The Seventh Circuit Court of Appeals failed to follow the precedence set forth in *Thompson v. Immigration and Naturalization Service, infra, Textor v. Board Of Regents Of*

Northern Illinois University, infra, and *Wort v. Vierling, infra* when it ruled that because Petitioner did not timely file an appeal after the Tax Court denied her first two motions to vacate, it did not have jurisdiction to hear an appeal of the denial of those motions.

2. The Seventh Circuit Court of Appeals erred when it found that the Tax Court did not abuse its discretion when it failed to file the Petitioner's third Motion to Vacate Decision.

The Seventh Circuit Court's review of the Tax Court's decision not to file and not to grant the Third Motion was a deferential one, that could be disturbed only upon a finding of an abuse of discretion. *Shakman v. City of Chicago,* 426 F.3d 925, 933 (7th Cir. 2005) *citing Browder v. Dir., Dep't of Corr. of Illinois,* 434 U.S. 257, 263 n.7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978). However, "[a] court has abused its discretion when it commits a clear error of fact or an error of law." *Id., quoting Incredible Techs., Inc. v. Virtual Techs., Inc.,* 400 F.3d 1007, 1011 (7th Cir. 2005). "Rulings on motions for reconsideration are committed to

the discretion of the Tax Court, subject to reversal only if 'extraordinary circumstances' clearly show that that discretion was abused." *LaBow v. Commissioner of Internal Revenue*, 763 F.2d 125, 129 (7th Cir. 1985) *citing Wilson v. Commissioner*, 500 F.2d 645, 648 (2d Cir. 1974).

In this case, extraordinary circumstances existed that clearly show that the Tax Court abused its discretion when it failed to file the Third Motion. First, although the Petitioner had timely filed a *pro se* motion to vacate, which the Tax Court had not seen as of the January 10th hearing, the Tax Court specifically told Petitioner's former counsel that the Court would be willing to consider such a motion filed by Petitioner. Second, the Tax Court granted Mr. Ertl's motion to withdraw as counsel, even though Mr. Ertl failed to discuss that motion with the Petitioner prior to his filing it with the Tax Court. Third, the Third Motion contained evidence newly discovered by the Petitioner that was not disclosed to her by her attorney until she finally

received a copy of her files from him: the fact that Mr. Ertl had provided a copy of the power of attorney in which Petitioner had specifically restricted his authority to negotiate on her behalf, but that he did not have the authority to sign any settlement or other dispositive documents. Thus, the Internal Revenue Service had notice that Mr. Ertl did not have the authority to sign the stipulation without consulting the Petitioner.

By not filing the Third Motion, the Tax Court condoned the wrongful behavior of both Mr. Ertl and the Internal Revenue Service by allowing a dismissal based on an unauthorized joint stipulation to stand. The Tax Court then further exacerbated this wrongful behavior by failing to file the Third Motion just days before the Petitioner's time to file an appeal on the first two motions to vacate ran, in what appeared to be a concerted effort to cause the Petitioner to miss the deadline for filing an appeal of those

rulings. In the interest of justice, this Court should seek to ensure that such behavior is not excused or condoned.

In this case, the Petitioner, a high-school educated, stay-at-home mother of four, was forced to seek the vacation of the Order of Dismissal on a *pro se* basis without any advanced notice when the Tax Court granted her attorney's motion to withdraw, and without access to her files until on or about February 1, 2006, when her attorney finally returned her files to her. Because of the extraordinary circumstances surrounding the dismissal of this case, Petitioner submits that the Tax Court abused its discretion when it failed to file the Petitioner's Third Motion and that the Seventh Circuit Court of Appeals erred when it failed to find that the Tax Court had abused its discretion in this manner.

3. The Seventh Circuit Court of Appeals erred when it ruled the Tax Court did not abuse its discretion when it failed to vacate its December 23, 2006 Order dismissing the case as requested in Petitioner's third Motion to Vacate Decision.

In filing her Third Motion, Petitioner relied on Seventh Circuit law in arguing that the Motion to Dismiss should be vacated. "An attorney may not consent to a final disposition of his client's case without express authority. [ ] Although an attorney of record is presumed to have his client's authority to compromise and settle litigation, a judgment entered upon an agreement by the attorney may be set aside on affirmative proof that the attorney had no right to consent to its entry." *Smith v. Widman Trucking & Excavating, Inc.*, 627 F.2d 792, 796 (7th Cir. 1980) *citing Bradford Exchange v. Trein's Exchange*, 600 F.2d 99, 102 (7th Cir. 1979). *See, also, Associates Discount Corp. v. Goldman*, 524 F.2d 1051 (3d Cir. 1975) (Third Circuit finding that the district court must, on remand, address the issue of the attorney's authority to settle); *Thomas v. Colorado Trust Deed Funds, Inc.*, 366 F.2d 136 (10th Cir. 1966) (Tenth Circuit finding it was abuse of discretion to

deny motion to vacate when stipulation of final disposition by attorney was not authorized by client).

In this case, it is undisputed that Mr. Ertl did not have the authority to execute the joint stipulation to dismiss Petitioner's case. Mr. Ertl admitted he did not have such authority, and the power of attorney signed by the Petitioner specifically restricted Mr. Ertl's authority to dispose of this case. Thus, it was an error of law for the Tax Court not to grant Petitioner's Third Motion, and the Tax Court's refusal to grant the Petitioner's Third Motion was an abuse of discretion. *See Shakeman, infra; Incredible Techs., infra.*

4. The Seventh Circuit Court Of Appeals Erred In Finding That The Tax Court Had Failed To Provide Petitioner A Degree Of Accommodation And A "Fair And Meaningful" Consideration Of Her Claims Before The Tax Court As A *Pro Se* Litigant.

Petitioner has vigorously pursued this case since 2000, when Congress passed the legislation allowing an innocent spouse to seek relief from tax liabilities incurred

on her behalf by her husband. Petitioner firmly believed that her attorney was preparing for a trial in this matter, when to her shock and disbelief and without having had any conversations with her attorney for almost four months, she received a facsimile from her attorney enclosing a signed joint stipulation for the dismissal of the case, which specifically admitted her liability and which granted the Internal Revenue Service permission to immediately pursue collection of the judgment.

Immediately upon receiving the facsimile, Petitioner called Mr. Ertl, and adamantly objected to the filing of the stipulation. The following day, Petitioner received a facsimile of the first Motion to Vacate which had been filed by the attorney, together with a Motion to Withdraw as Counsel, which had also been filed. Not knowing what to do, Petitioner prepared a second motion to vacate, which she filed several days later, stressing the fact that she had never authorized the law firm to file such a stipulation.

Petitioner did not hear from her attorney again until after the January 10, 2006 hearing, when she received a letter from him informing her that the first motion to vacate had been denied, that the Tax Court had not seen the second motion to vacate, but would consider such a motion if Petitioner wished to file one, and that his motion to withdraw as counsel had been granted. Despite requesting her files from her attorney on or about January 11, 2006, she did not receive them until on or about February 1, 2006. Upon a review of her files, Petitioner discovered that her attorney had provided a copy of her power of attorney to the attorney for the Internal Revenue Service. It was based upon her learning that the Internal Revenue Service was aware at the time of the stipulation that her attorney did not have the authority to enter into any agreement or disposition of her case that Petitioner filed the Third Motion.

Because the Tax Court granted Mr. Ertl's motion to withdraw as counsel for Petitioner, she was forced to proceed in this case *pro se,* without receiving any relief from the Court due to the fact that it had granted a motion to withdraw as counsel during which critical time periods were running, and Petitioner did not have sufficient time to obtain alternate counsel during such time period. As a *pro se* litigant, the Tax Court had special obligations to ensure that Petitioner's claims were given "fair and meaningful consideration". *See Caruth v. Pinkney*, 683 F.2d 1044, 1050 (7th Cir. 1982), *Madyun v. Thompson*, 657 F.2d 868, 876 (7th Cir. 1981). Although generally, "pro se plaintiffs are entitled to more lenient standards in some circumstances, the standards do not diminish in complying with procedural rules," *Adams v. Connors*, 2002 U.S. Dist. LEXIS 14664 *15 (N.D. Ill., Eastern Div. 2002)(citations omitted), "how far a trial court should be required – or permitted – to go in any given case in assisting a pro se litigant is unclear and

undecided. Accordingly, the ultimate determination of whether a pro se litigant has received a fair and meaningful consideration of his claims must be made on a case-by-case basis." *See Caruth, infra.*

In addition to allowing counsel to withdraw while critical time periods were running, and denying the first and second motions to vacate the joint stipulation until at least a hearing could be heard on the merits of whether Petitioner had authority to enter into such a stipulation, the Tax Court held a telephonic conference just days before the official appeal period would otherwise have run, during which the Court lead the Petitioner to believe that the Court was considering the merits of her Third Motion. Had the Tax Court even hinted that it might be considering ruling that the Third Motion was untimely filed, Petitioner would have had time to timely file the Notice of Appeal. Instead, the timeliness of the Third Motion was never discussed, and at the conclusion of the hearing, the Tax

Court indicated that it was taking the Third Motion under consideration and that it would be issuing a ruling. This led the Petitioner to believe that such a ruling would be forthcoming. Instead, the Tax Court merely stated that it was not going to allow the Third Motion to be filed, and giving notice to Petitioner in such a manner that she would not receive it until after the official time for filing an appeal would have run.

Not only did the actions of the Tax Court deprive the Petitioner of a fair and reasonable consideration of her claims, the Tax Court's actions could be construed to intentionally mislead the Petitioner so as to delay her filing of an appeal until the time for filing a Notice of Appeal had run. Thus, Petitioner was not afforded the accommodation by the Tax Court to which she was entitled as a *pro se* litigant. *Adams v. Connor, infra.*

The Seventh Circuit erred when it failed to consider these facts when it ruled that Petitioner's appeal of the

denial of the first and second motions to dismiss were not timely filed. Accordingly, the Seventh Circuit erred in so ruling, and such error denied Petitioner the special obligations to ensure that Petitioner's claims were given "fair and meaningful consideration" as required of a pro se litigant.

Conclusion

Petitioner waited years and years to have this case heard by the Tax Court, only to be wrongfully abused by her attorney who elected to sign a joint stipulation admitting her liability without ever having discussed filing such a stipulation with her. Indeed, it had been months since Petitioner had heard from her attorney, and was totally unaware of what progress, if any, he had made on her case. She was completely unaware of any conversations that the attorney had had with the Internal Revenue Service. Instead, in an apparent collusion between her attorney and the Internal Revenue Service, who was aware

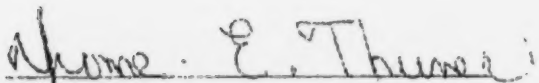
that Petitioner's attorney did not have the authority to enter into any settlement or dismissal of her case, Petitioner's case was dismissed. When the Petitioner immediately brought this to the attention of the Tax Court in the form of several motions to vacate, the Tax Court denied the motions, without ever hearing directly from the Petitioner, because the attorney "said he thought he had good reason to sign the stipulation". *See* Appendix 3, ¶ 3. This is completely contrary to law. *See Smith v. Widman, Infra., Associates Discount Corp., infra., Thomas, infra.*

The Tax Court then further exacerbated the problem when it granted Mr. Ertl's motion to withdraw as counsel for the Petitioner without any prior notice to the Petitioner, leaving the Petitioner with no attorney during a time when critical motions and appeals were required to be filed. Mr. Ertl violated his ethical duties to notify the Petitioner as to these time periods, but the Tax Court should have ensured that he complied with those obligations, given that Mr. Ertl

had already violated his ethical duties to keep the Petitioner informed as to her case, and by stipulating to a dismissal of her case without ever consulting her. Doing so deprived the Petitioner a fair and meaningful consideration of her claims. *See Caruth, infra., Madyun, infra.*

In affirming the Tax Court's rulings, and by refusing to consider the Tax Court's denial of the first two Motions to Vacate, the Seventh Circuit Court of appeals also denied the Petitioner a fair and meaningful consideration of her claims. Accordingly, the Seventh Circuit Court of Appeals affirmation of the Tax Court's orders, and the Seventh Circuit Court of Appeals refusal to consider the Tax Court's rulings on the first tow Motions to Vacate should be overturned, and the case should be remanded to the Tax Court for a hearing on the facts.

Respectfully submitted,



Yvonne E. Thurner, *pro se*
Petitioner
1441 N. Mayfair Dr.
Wauwatosa, WI 53226
(414) 257-3900

Appendix 1

UNITED STATES TAX COURT

YVONNE E. THURNER,	)	
	)	
Petitioner,	)	
	)	
	)	Docket No. 9971-01
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
Respondent,	)	

DECISION

Pursuant to the agreement of the parties in this case, it is

ORDERED AND DECIDED: That the petitioner is not entitled to relief under I.R.C. § 6015(b), (c), or (f) with respect to income tax liability for the taxable years ended December 31, 1080, 1981, 1990 and 1992.

{Signed} Stephen J. Swift

Judge.

Entered: DEC 23 2005

It is hereby stipulated that the Court may enter the foregoing decision in this case.

It is further stipulated that interest will be assessed as provided by law on the tax liability due from petitioner.

Appendix 2

UNITED STATES TAX COURT

YVONNE E. THURNER,	)	
	)	
Petitioner,	)	
	)	
	)	Docket No. 9971-01
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent,	)	

MOTION TO WITHDRAW AS COUNSEL

Counsel for the Petitioner, The Law Office of Robert G. Bernhoft, S.C., by Attorney Christopher J. Ertl, hereby respectfully moves the court for leave of the court to withdraw as said counsel. This motion is filed pursuant to Rule 50 and based upon the record in this matter and the attached declaration of Attorney Christopher J. Ertl, which show that:

1. The attorney-client relationship between the petitioner and her counsel is irreconcilably broken;
2. Counsel for the petitioner can no longer properly advocate her cause;
3. Counsel for the petitioner further assert that there are additional reasons that justify withdrawal in this matter. However, such reasons are based on confidential information protected by the attorney-client privilege and that the disclosure of such information could potentially compromise the petitioner's interests in this matter.

WHEREFORE counsel for the petitioner, the Law Office of Robert G. Bernhoft, S.C., respectfully request that this court grant their motion for leave to withdraw as counsel.

Dated: December 28, 2004 *(sic)*

Respectfully submitted,

/s/

Christopher J. Ertl
TC#EC0134

207 East Buffalo Street
Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
cjertl@bernhoftlaw.com

Attorney for Petitioner

U.S. Tax Court

GRANTED

January 10, 2006

{Signed} Stephen J. Swift

Appendix 3

UNITED STATES TAX COURT

YVONNE E. THURNER,	)	
	)	
Petitioner,	)	
	)	
	)	Docket No. 9971-01
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent,	)	

MOTION TO VACATE DECISION

The petitioner, Yvonne Thurner, by and through counsel, the Law Office of Robert G. Bernhoft, S.C., hereby respectfully moves the court for an order vacating its decision in the above-captioned matter. This motion is filed pursuant to Rules 50 and 162 and based upon the record in this matter and the attached declaration of Attorney Christopher J. Ertl, which show that:

1. On December 23, 2005, the court entered a decision effectively resolving this matter in favor of the Commissioner and against Ms. Thurner;
2. The court's decision was based upon a stipulation of the parties signed by Attorney James Klein on behalf of the Commissioner and by Attorney Christopher J. Ertl on behalf of Ms. Thurner;
3. On December 15, 2005, Attorney Ertl had good reason to believe that he had authority to sign the stipulation on behalf of Ms. Thurner;
4. On December 20, 2005, Ms. Thurner advised Attorney Ertl that she did not agree with the stipulation and that she had not authorized it;
5. This motion to vacate is filed within 30 days after the decision has been entered.

Wherefore, the petitioner respectfully reuest that this court enter an order vacating its decision entered December 23, 2005 and schedule this matter

for a status hearing at a time and date certain convenient to the court.

Dated: December 28, 2004 *(sic)*

Respectfully submitted,

/s/

Christopher J. Ertl
TC#EC0134

207 East Buffalo Street
Suite 600
Milwaukee, Wisconsin 53202
(414) 276-3333 telephone
(414) 276-2822 facsimile
cjertl@bernhoftlaw.com

Attorney for Petitioner

U.S. Tax Court

DENIED

January 10, 2006

{Signed} Stephen J. Swift

Appendix 4

UNITED STATES TAX COURT

YVONNE E. THURNER,	)	
	)	
Petitioner,	)	
	)	
	)	Docket No. 9971-01
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent,	)	

MOTION TO VACATE DECISION

Pursuant to Fed.R.Civ.P. 60(b), Petitioner, Yvonne E. Thurner, hereby files this Motion to Withdraw the Stipulation for Decision filed in this case on or about December 13, 2005. As of December 28, 2005, Petitioner has not received a copy of the executed stipulation, but has been orally told that it has been filed. In support of her Motion, Petitioner states as follows:

1. At no time prior to the filing of this stipulation was I consulted about this proposed stipulation, or its

contents. My attorney, Christopher Ertl, never informed me that he was discussing or agreeing to such a stipulation with counsel for the Respondent, nor did he ever provide me a copy of such proposed stipulation prior to agreeing to it. In fact, I have not spoken with Mr. Ertl since early September. Thus, I was surprised last week when I was first informed that the stipulation had been filed. Although I had attempted to contact Mr. Ertl during the period that he apparently had been negotiating this stipulation with counsel for the Respondent, he was unable to take my calls and failed to return my calls informing me of the status of my case. Had I been aware that Mr. Ertl was considering such a stipulation, I would have objected strenuously, particularly since it admits to a liability on my behalf that I continue to deny.

2. Mr. Ertl's agreement to this stipulation is beyond the scope of the authority that I granted to him in this case. As a result, I believe that he misrepresented his

authority to opposing counsel and the Court in filing this stipulation.

3. Mr. Ertl's violated his ethical duties to keep me informed of the status of this case. His entering into a stipulation without ever consulting me that admits my liability and which permits the Respondent to begin collection actions immediately without is, at a minimum, a violation of his ethical duties and his responsibilities to me. I also received notice on December 28, 2005, from Mr. Ertl that he is terminating his representation of me in this matter. Thus, to the extent that there are any matters scheduled in this case, I request sufficient time to find substitute counsel before proceeding.

For the foregoing reasons, I respectfully request that this Court grant this Motion, that the Court issue such sanctions against Mr. Ertl as it deems appropriate, and that the Court grant me such time as necessary to find substitute counsel to represent my interests in this case.

Respectfully submitted,

/s/

Yvonne E. Thurner, pro se

U.S. Tax Court

DENIED

January 10, 2006

{Signed} Stephen J. Swift

Appendix 5

UNITED STATES TAX COURT

YVONNE E. THURNER,	)	
	)	
Petitioner,	)	
	)	
	)	Docket No. 9971-01
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE,	)	
	)	
	)	
Respondent,	)	

ORDER

Taking into account the conference call held between the parties on April 11, 2006, and upon due consideration of petitioner's untimely submitted third Motion to Vacate Decision, received by the Court on March 9, 2006, it is

ORDERED that the above-referenced untimely submitted third motion to vacate decision will not be filed.

/s/

Stephen J. Swift
Judge

DATED: Washington, D.C.
April 13, 2006

Appendix 6

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

July 27, 2006

Before

Hon. Daniel A. Manion, *Circuit Judge*
Hon. Michael S. Kanne, *Circuit Judge*
Hon. Diane P. Wood, *Circuit Judge*

YVONNE E. THURNER Petitioner-Appellant,	]	Appeal from the United States Tax Court
No. 06-2383 v.	]	No. 9971-01
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.	]	

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that this appeal is LIMITED to a review of the Tax Court's order of April 13, 2006.

Rule 13(a) and (b) of the Federal Rules of Appellate Procedure requires that a notice of appeal in a Tax Court case be filed in the Tax Court within 90 days of the entry of the decision appealed. In this case the Tax Court entered its decision on December 23, 2005, and the decisions denying petitioner's first and second amended motions to vacate were entered on January 10, 2006 and January 17, 2006 respectively. It appears, however, that the notice of appeal was postmarked on May 2, 2006, 15 days late as to the January 17, 2006 order (denying petitioner's second motion to vacate) and accordingly untimely as to the Tax Court's earlier decisions as well. This appeal is timely only as to the order of April 13, 2006.

IT IS FURTHER ORDERED that this appeal, as LIMITED, shall proceed to briefing. The briefing schedule is as follows:

1. The appellant shall file her brief and required short appendix on or before September 1, 2006.

2. The appellee shall file his brief on or before October 2, 2006.

3. The appellant shall file her reply brief, if any, on or before October 16, 2006.

Appendix 7

YVONNE E. THURNER, Petitioner-Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 06-2383

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2007 U.S. App. LEXIS 27176; 100 A.F.T.R.2d (RIA) 6774

November 20, 2007, Decided

ORDER

Yvonne Thurner challenges the Tax Court's refusal to consider her third motion to vacate the parties' stipulation of dismissal. For the reasons that follow, we affirm.

This appeal constitutes the latest attempt by Thurner to evade her outstanding tax liability. *See United States v. Thurner, 21 Fed. Appx. 477, 478-79 (7th Cir. 2001).* The background history is uncontested. The Internal Revenue Service determined that Thurner and her husband, Scott, underpaid their federal taxes for 1981, 1990, and 1992. With interest and penalties, the government sought a total of approximately $ 2.9 million. After receiving notice of the deficiency, Thurner and her husband eventually paid almost $ 1.7 million. The government then filed suit in 2000 to recover the balance. [*2] The district court granted summary judgment in favor of the government and in 2001, after concluding that Thurner and her husband had filed a frivolous appeal, we affirmed that judgment and sanctioned them. *See id.*

In December 2000, after the district court ruled against them but before we issued our decision, Thurner again requested relief from the Tax Court, asserting, among other

claims, that she was an "innocent spouse" under *26 U. S. C. § 6015(b)* of the Internal Revenue Code. The government moved for summary judgment, which the Tax Court granted in part, but the court concluded that Thurner's claim for relief as an innocent spouse should continue. *See Thurner v. Comm'r, 121 T.C. 43, 53 (2003).* Turner eventually sought counsel, and in December 2005 both Thurner's lawyer and the government's lawyer stipulated to the Tax Court that she was not entitled to relief under *§ 6015*. In his declaration to the Tax Court, Thurner's attorney insisted that he "believed . . . [he] had the authority on behalf of Yvonne Thurner to execute the [s]tipulation . . . ." But five days after the Tax Court accepted the stipulation to dismiss, Thurner informed the attorney that she had not authorized the [*3] stipulation and did not agree with it. Thurner's lawyer then moved to both vacate the Tax Court's acceptance of the stipulation and to withdraw from the case. Thurner also filed a pro se

motion to vacate the decision. In January 2006 the Tax Court granted the attorney's motion to withdraw, but denied both counsel's and Thurner's motions to vacate. Thurner did not timely appeal that denial, nor the stipulated dismissal of her case one month earlier.

In March 2006 Thurner filed her third motion to vacate. After noting that the motion was untimely because Thurner had filed it more than thirty days after the court's decision to accept the stipulation, *see Tax Court Rule 162, 26 U.S.C. § 7453*, the Tax Court refused to consider the motion. Thurner then filed a notice of appeal, apparently seeking to challenge all of the Tax Court's rulings. Because the notice was untimely as to the December and January orders denying relief, we limited the appeal to a review of the Tax Court's order refusing the third motion to vacate.

[HN1] We review, for an abuse of discretion, the Tax Court's refusal to vacate the stipulated dismissal order. *See*

Drobny v. Commissioner, 113 F.3d 670, 676-77 (7th Cir. 1997). We previously [*4] have analogized a tax court's denial of a motion to vacate to a district court's denial of relief from judgment under *Federal Rule of Civil Procedure 60(b). See id.; Estate of Kraus v. Comm'r, 875 F.2d 597, 602 (7th Cir. 1989).* This type of relief is "an extraordinary remedy and is granted only in exceptional circumstances." *Harrington v. City of Chi., 433 F.3d 542, 546 (7th Cir. 2006)* (quotation omitted). A court has abused its discretion only where no reasonable person could agree with its judgment. *See Harold Washington Party v. Cook County, Ill. Democratic Party, 984 F.2d 875, 879 (7th Cir. 1993).*

Thurner claims she submitted "newly discovered" evidence showing that her attorney did not have the authority to enter into the stipulation. But she raised the same argument of lack of authority in her first and second motions to vacate, and she does not explain--as she must--why she could not have presented this evidence earlier. *See*

[HN2] *Fed. R. Civ. P. 60(b)(2)* (new evidence must have been unavailable at time of original decision); *Publicis Commun. v. True North Communs. Inc., 206 F.3d 725, 730 (7th Cir. 2000).* Moreover, we cannot see how the Tax Court abused its discretion in refusing [*5] to hear for the third time her argument that her retained attorney was not authorized to enter stipulation. *See Caisse Nationale de Credit Agricole v. CBI Indus., 90 F.3d 1264, 1270 (7th Cir. 1996)* ([HN3] "Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion."). Finally, [HN4] motions to vacate are not a substitute for an appeal, *Local 322, Allied Indus. Workers of Am. v. Johnson Controls, Inc., 969 F.2d 290, 292-93 (7th Cir. 1992),* and Thurner failed to appeal the original decision denying her motion to vacate the dismissal order.

AFFIRMED.

Appendix 8

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

February 11, 2008

Before

Hon. MICHAEL S. KANNE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Hon. ANN CLAIRE WILLIAMS, *Circuit Judge*

No. 06-2383

YVONNE E. THURNER
Petitioner-Appellant,

v.

COMMISSIONER OF
INTERNAL REVENUE,
Respondent-Appellee.

Appeal from the United States Tax Court

No. 9971-01

ORDER

On December 4, 2007, the petitioner-appellant filed a petition for rehearing and petition for rehearing en banc. All the judges on the original panel have voted to deny a rehearing, and

none of the judges in the active service have requested a vote on the petition for rehearing en banc. The petition for rehearing and rehearing en banc are therefore DENIED.